FILED
OCT 26 1956
JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,

Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,

Appellees.

Charlie & Yale

Appeal from the Supreme Court of the State of California.

MOTION TO DISMISS

J. F. COAKLEY,
District Attorney of the County of Alameda,

R. ROBERT HUNTER,
Chief Assistant District Attorney,

RICHARD J. MOORE,
Deputy District Attorney,

MAURY ENGEL,
Deputy District Attorney,
Court House, Oakland 7, California,
Attorneys for Defendant and Appellee County of Alameda.

JOHN W. COLLIER,
City Attorney of the City of Oakland,

ROBERT E. NISBET,
Deputy City Attorney,
City Hall, Oakland 12, California,
Attorneys for Defendant and Appellee City of Oakland.

EDMUND G. BROWN,
Attorney General of State of California,

CLARENCE A. LINN,
Assistant Attorney General,
State Bldg., San Francisco 2, Calif.,
Attorneys for Defendants and Appellees.

SUBJECT INDEX

	Page
Motion to Dismiss	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement	3
Argument	5
I. Appellant's Claim That the 1951 Amendment to Section 214 Violates the First and Fourteenth Amendments Does Not Present a Substantial Federal Question	5
II. Appellant Lacks Standing to Maintain This Action	10
Conclusion	14

TABLE OF AUTHORITIES CITED

Cases

Alabama State Federation of Labor v. McAdory, 325 U.S. 450	13
Bell's Gap Railroad Co. v. Pennsylvania, 134 U.S. 232	9
Coler v. Corn Exchange Bank, 250 N.Y. 136; 164 N.E. 882	7
Darnell v. Indiana, 226 U.S. 390	8
Doremus v. Board of Education, 342 U.S. 429	10, 13
Everson v. Board of Education, 330 U.S. 1	7, 8, 9
First Methodist Episcopal Church South v. Atlanta, 76 Ga. 181	7
Garrett Biblical Institute v. Elmhurst State Bank, 331 Ill. 308; 163 N.E. 1	7
Gibbons v. District of Columbia, 116 U.S. 404	8
Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203	7
Jackman v. Rosenbaum Co., 260 U.S. 22	5
Jeffrey Manufacturing Co. v. Blagg, 235 U.S. 571	8
Kies v. Lowrey, 199 U.S. 233	9
Merchants' and Manufacturers' Bank v. Pennsylvania, 167 U.S. 461	9
Metropolitan Street Railway Co. v. New York State Board of Tax Commissioners, 199 U.S. 1	9
Pierce v. Society of Sisters, 268 U.S. 510	9
Pritchard v. County Court of Kanawha County, 109 W. Va. 429; 155 S.E. 542	7
Public Service Commission v. Wycoff Co., 344 U.S. 237	13
Rawlins v. Georgia, 201 U.S. 638	9
State v. Collector of Jersey City, 24 N.J.L. 108	8
The Trustees of Griswold College v. The State of Iowa, 46 Iowa 275	7

TABLE OF AUTHORITIES CITED (Continued)

	Page
United Public Workers v. Mitchell, 330 U.S. 75	13
White v. Smith, 189 Pa. 222; 42 A. 125	7
Williams v. Baltimore, 289 U.S. 36	9
Williams v. Riley, 280 U.S. 78	10
Zorach v. Clauson, 343 U.S. 306	7, 8

CONSTITUTIONS

California Constitution: Article XIII, Section 1a	7

RULES

Revised Rules of the Supreme Court of the United States, Rule 16(1)	1

STATUTES

California Education Code, Sections 16601 and 16624	5, 8
California Government Code	
Section 29040	11
Section 29060	11
Section 29061	11
Section 29070	11
Section 29071	11
Section 29072	11
Section 29074	11
Section 29080	11
Section 29091	12
Section 29120	12
California Revenue and Taxation Code, Section 214	3, 4
U.S.C., Title 28, Section 1257(2)	2

TEXTS AND OTHER AUTHORITIES

Gabel, Public Funds for Church and Private Schools (1937), p. 566	6
12 Hening, Statutes of Virginia (1823), 84	6
Virginia Statutes at Large, Sheperd, Continuation of Hening, p. 149, 200	6
Torpey, Judicial Doctrines of Religious Rights in America (1948), Ch. VI	6
Zollman, Tax Exemptions of American Church Property (1916), 14 Mich. L. Rev. 646, 647-650	6

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,

Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,

Appellees.

Appeal from the Supreme Court of the State of California.

MOTION TO DISMISS

Appellees County of Alameda and City of Oakland move, pursuant to Rule 16(1) that the appeal from the final judgment of the Supreme Court of California be dismissed for want of jurisdiction on the grounds (1) that the appeal does not present a substantial

federal question, and (2) that the appeal does not present a justiciable case or controversy within the jurisdiction of this Court.

OPINIONS BELOW

The opinion of the Supreme Court of California (Jur. St., App. A) is reported at 48 A. C. 648, 298 P. 2d 1. The findings of fact and conclusions of law of the Superior Court of the State of California in and for the County of Alameda (Jur. St., App. B) are not reported.

JURISDICTION

The judgment of the Supreme Court of California was filed on June 6, 1956, and the petition for rehearing was denied without opinion on July 5, 1956. Notice of Appeal was filed on August 3, 1956. The jurisdiction of this Court is sought to be invoked under U. S. C., Title 28, Section 1257(2).

Jurisdiction is challenged by this motion.

QUESTIONS PRESENTED

California, by legislation in 1951 which was approved by referendum in 1952, exempted from taxation property used exclusively for school purposes of less than collegiate grade and owned and operated by nonprofit religious, hospital or charitable funds, foundations or corporations. Appellant sought by injunction to prevent the local authorities in Alameda County, where he resides, from according the exemption to the

schools falling within the description of the statute. The questions presented are:

1. Does the statutory exemption violate the Fourteenth Amendment to the Constitution, to the extent that it applies to the States the prohibition of the First Amendment?

2. Does appellant have standing to raise any question in this Court?

STATEMENT

In 1951, the legislature of California, by amendment to Section 214 of the Revenue and Taxation Code of that State, exempted from taxation "Property used exclusively for school purposes of less than collegiate grade and owned and operated by (nonprofit) religious, hospital or charitable funds, foundations or corporations . . ." The amendment was approved by referendum vote of the electorate of California at a general election in November, 1952.

In February, 1953, one Alfred J. Lundberg commenced this action against the County, the City of Oakland, which is in Alameda County, and certain county and city officers, to enjoin them from granting a tax exemption to the schools falling within the requirements of the 1951 amendment to Section 214. Lundberg claimed to sue on his own behalf as a resident, citizen and taxpayer of the city and county, and in behalf of all other citizens, residents and taxpayers of said city and county who were similarly situated.

The Amended Complaint, filed in May, 1953, challenged the amendment to Section 214 on a variety of grounds. Apart from those which related to the Constitution of California and which are no longer significant here, it charged that the amendment was invalid under the Fourteenth Amendment to the Federal Constitution in that (1) it arbitrarily distinguished between nonprofit, private schools and private schools which are operated for profit (VIII|c| and |d|); and (2) it would be enforced "in a grossly disproportionate manner" to exempt "the property of parochial schools of one particular sect, and of which plaintiff is not a member" (VIII|c|); and that (3) it violated the First Amendment as applies to the States under the Fourteenth Amendment (VIII|b|).

The case was tried in June, 1953, before three judges in the Superior Court in and for the County of Alameda. On September 14, 1953, a majority of that court filed findings of fact and conclusions of law holding that the 1951 amendment to Section 214 was invalid as in conflict with the Constitution of California. The majority made no findings, and reached no conclusions on the Federal constitutional issues (Jur. St., App. B., pp. 20-38). The third judge, in dissent, found the 1951 amendment constitutional in all respects (Jur. St., App. B., pp. 43-50).

On appeal from that judgment, the Supreme Court of California reversed. The majority of that court, devoting the greater part of its discussion to the issues relating to the Constitution of California, held the

1951 amendment to be valid in all respects (Jur. St., App. A., pp. 1-13). Three justices dissented, solely on the *State* constitutional grounds (Jur. St., App. A., pp. 14-19).

The opinion of the Supreme Court of California was handed down on June 6, 1956. On June 14, 1956, Alfred J. Lundberg died. Shortly thereafter the present appellant, Paul W. Heisey, moved, *ex parte*, in the Superior Court that he be added, in his individual capacity, as an additional plaintiff, and upon obtaining an order to that effect, he was brought into the case in the Supreme Court of California (Jur. St., App. D., p. 51). He filed a petition for rehearing, which was denied on July 5, 1956, and he is the appellant here. No personal representative of Alfred J. Lundberg, the original plaintiff, has appealed.

ARGUMENT

I. APPELLANT'S CLAIM THAT THE 1951 AMENDMENT TO SECTION 214 VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant, in asking this Court to set aside the tax exemption of private, nonprofit schools below the collegiate grade, directly challenges the right of any State, under the Federal Constitution, to thus exempt any schools in which religious instruction is given in addition to the secular education required of all schools under state law. (California Education Code, Sections 16601, 16624.) Appellant claims the Fourteenth Amendment prohibits this exemption because it incorporates the prohibitions of the First Amendment

against laws "respecting an establishment of religion or prohibiting the free exercise thereof."

The answer to this sweeping charge is that given many years ago by Mr. Justice Holmes: The Fourteenth Amendment, itself a historical product, did not destroy history for the States." *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31. Religious schools and colleges have been accorded tax exemption by the States from the earliest days of our history.[1] Virginia, for example, was among the earliest and most vigorous of the States in its legislative policy against any form of religious establishment. The Virginia Bill for Religious Liberty (12 Hening, Statutes of Virginia [1823] 84) was adopted in 1785, and in 1799 Virginia passed a further act closing all possible loopholes left by the original statute, and repealing a long list of earlier acts which retained the vestiges of establishment (Virginia Statutes at Large, Sheperd, Continuation of Hening, p. 149). Yet in the following year, 1800, Virginia adopted a statute granting complete tax exemption to all property belonging to any "houses for divine worship or seminary of learning" (*id.*, p. 200).

Not only is the exemption of long standing, but it is also universally in force today. The very exemption which is now challenged in California exists in every one of the forty-eight states and in the District of Columbia.[2] California, which had accorded the exemp-

[1] Zollman, Tax Exemptions of American Church Property (1916), 14 Mich. L. Rev. 646, 647-650; Torpey, Judicial Doctrines of Religious Rights in America (1948), Ch. VI.

[2] The constitutional and statutory provisions granting the exemption are collected in Gabel, Public Funds for Church and Private Schools, p. 566 (1937).

tion to religious schools of collegiate grade since 1914 (Cal. Const., Art. XIII, Sec. 1a), has by the 1951 amendment extended the exemption to all schools, of whatever grade, thus removing the last exception to the universality of that exemption in the United States.

In the light of all this, it is not surprising that in the few cases in which the exemption has ever been challenged, either under the First and Fourteenth Amndments, or under provisions similar to the First Amendment which are found in state constitutions, it has been sustained. *Garrett Biblical Institute* v. *Elmhurst State Bank*, 331 Ill. 308, 163 N. E. 1 (1928); *The Trustees of Griswold College* v. *The State of Iowa*, 46 Iowa 275 (1877); *see also White* v. *Smith*, 189 Pa. 222, 42 A. 125 (1899); *Pritchard* v. *County Court of Kanawha County*, 109 W. Va. 429, 155 S. E. 542 (1950); Cf. *First Methodist Episcopal Church South* v. *Atlanta*, 76 Ga. 181, 196 (1886).

To contend, as appellant does, that this "verdict of quiescent years" (Cardozo, C. J., in *Coler* v. *Corn Exchange Bank*, 250 N. Y. 136, 141; 164 N. E. 882, 884 [1928], aff'd 280 U. S. 218) has been upset by the recent decisions of this Court, requires no extended comment. The exposition which the First Amendment has received in *Everson* v. *Board of Education*, 330 U. S. 1; *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203; and *Zorach* v. *Clauson*, 343 U. S. 306, shows nothing which would condemn a statute which grants an exemption from taxes to all nonpublic, nonprofit private schools, whether or not they are

owned or supported by religious groups. That amendment, as the Court observed in the *Everson* case (330 U.S. at p. 18), "requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary." The Court later added, in *Zorach* v. *Clauson*, 343 U. S. 306, 314: "But we find no constitutional requirement which makes it necessary for Government to be hostile to religion . . ." California has now simply extended its neutrality from the collegiate level to the entire range of private schools, as each of its sister states had already done many years before. Indeed, were the First and Fourteenth Amendments to condemn the exemption involved here, they would seem to condemn, *a fortiori*, the tax exemption which has been accorded to churches and other places of public worship, which is "so entirely in accord with the public sentiment that it universally prevailed." *State* v. *Collector of Jersey City*, 24 N. J. Law 108, 120 (1853). Cf. *Gibbons* v. *District of Columbia*, 116 U. S. 404, 408.

No more than a word is necessary on the additional questions which appellant seeks to raise under the due process and equal protection clauses of the Fourteenth Amendment (Jur. St., pp. 6-9).[1] Appellant's questions 2, 3 and 6, though somewhat differently phrased, appear to be based on the assertion that the 1951 exemption deprives appellant of property for a nonpublic

[1] Contrary to appellant's statement (Jur. St., pp. 16, 17), those questions were not raised by the Amended Complaint. They were not passed upon by the Court below (Jur. St., App. A). They are alluded to only by argument and in brief. They are not open here. Furthermore, it nowhere appears that either Lundberg, the original plaintiff, or Heisey, the appellant, belong to any class for whose sake the equal protection clause could be invoked. See *Darnell* v. *Indiana*, 226 U. S. 390, 398; *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571, 576.

purpose because most of the nonpublic schools teach sectarian and denominational doctrine in addition to secular studies.[1]

This Court rejected a similar argument in the *Everson* case (330 U. S. at p. 7): "It is much too late to argue that legislation, intended to facilitate the opportunity of children to get a secular education serves no public purpose." Cf. *Pierce* v. *Society of Sisters*, 268 U. S. 510. Moreover, in extending tax exemptions, the range of discretion accorded to the legislative authority is extremely broad. *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Metropolitan Street Railway Co. v. New York State Board of Tax Commissioners*, 199 U. S. 1, 47, 50; and *Williams v. Baltimore*, 289 U. S. 36, 42.

Questions 4, 5 and 7 (Jur. St., pp. 7-9) are obviously thinly veiled attempts to present to this Court the questions of State law which were passed upon by the California Court. Clearly, appellant cannot, under the guise of the Fourteenth Amendment, extend this Court's jurisdiction to a review of the construction of a State's constitution by its highest court. *Rawlins* v. *Georgia*, 201 U.S. 638; *Kies* v. *Lowrey*, 199 U.S. 233; and *Merchants' and Manufacturers' Bank* v. *Pennsylvania*, 167 U. S. 461.

[1] No private school, whether tax-exempt or not, may operate in California unless it maintains a curriculum of secular education which complies with the state standards for public schools. California Education Code, Sections 16601, 16624.

II. APPELLANT LACKS STANDING TO MAINTAIN THIS ACTION.

In addition to the absence of any substantial federal question, the appeal must also be dismissed because of the lack of any sufficient standing by appellant to prosecute it. Appellant purports to sue as a taxpayer, a resident and a citizen of Alameda County, and on behalf of all other taxpayers, residents and citizens similarly situated. Clearly, that he is a resident or a citizen, or a representative of other residents or citizens, gives him no standing to complain. *Doremus* v. *Board of Education*, 342 U. S. 429. Appellant must show, "not only that the (state) statute is invalid but that he has sustained or is in immediate danger of sustaining some direct injury as a result of its enforcement" *(id.*, at p. 434). As the Court stated in *Williams* v. *Riley*, 280 U. S. 78, 80:

> "The federal courts have no power *per se* to review and annul acts of state legislatures upon the ground that they conflict with the federal or state constitutions. 'That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.' "

Passing for the moment the additional problems raised by the death of the original plaintiff, Lundberg, and the addition of the present appellant, it is apparent, under Federal law, that from the outset this has not been a "good faith pocketbook action." *Doremus* v. *Board of Education*, 342 U. S. 429, 434.

This action was begun, and the trial held, before the beginning of the first fiscal year in which the assailed exemption was to take effect;[1] before any application for exemption under the amended statute had been approved;[2] before—insofar as the record shows—the various county officials had so much as filed the preliminary itemized statements of anticipated revenue and expenditures for the new fiscal year, the first step to be taken in a multi-step process culminating in the computation of a new tax rate.[3]

Apparently appellant assumes that none of these considerations are material, and that standing to maintain the suit can be shown by a speculative calculation

---

[1]The original complaint was filed February 2, 1953; the amended complaint was filed May 12, 1953. The trial was held on June 4, 1953. The first fiscal year in which the exemption was to take effect began July 1, 1953. A representative of the Assessor's Office testified at the trial that the tax rate for the incoming year was not yet known. (Settled Statement, p. 44, lines 19-20.)

[2]Settled Statement, pp. 44-51.

[3]California Government Code Section 29040 (1952) provides that:

> "On on before July 10 in each year as the board [of supervisors] directs, each county official or person in charge of any office, department, service, institution, or district of a county . . . shall file with the county auditor an itemized estimate of anticipated revenue and expenditures."

From these estimates the auditor is to prepare a tabulation showing the complete expenditure program of the county and special districts for the budget period and the source of revenue by which it is to be financed. [Sections 29060, 29061.]

Section 29070 provides that:

> "The tabulation shall be submitted by the auditor to the clerk of the board on or before July 30 of each year as the board directs."

The board is to consider the tabulation and on or before August 10 of each year "make . . . any revisions, reductions or additions therein that it deems advisable." [Section 29071.]

The tabulation as revised constitutes the "preliminary county budget for the period for which it is intended to apply." [Section 29072.]

Sections 29074 and 29080 deal with a procedure whereby taxpayers may appear at a meeting of the board on or before August 10 of each year and be "heard regarding the increase, decrease or omission of any item of the budget or for the inclusion of additional items."

Finally, Section 29091 provides that "not later than August 30 of each year" and after making any changes in the preliminary budget it deems advisable "the board shall by resolution adopt the budget as finally determined." On or before September 1 of each year the board then fixes the rates of county and district taxes on the secured roll designating the number of cents levied on each $100 of taxable value. (Section 29120.)

involving uncertain data for a period when the assailed exemption was not yet in effect. Thus, he can only assert that *if* the property of nonprofit private schools had been exempted during the 1952-1953 fiscal year, and *if* expenditures for public schools had been maintained at the same level, and *if* the loss of revenue from the exemption has not been met by resort to other sources of revenue, then the tax rate on property in Alameda County, some of which was owned by appellant, would have risen one cent and four mills per hundred dollars of assessed valuation.

This triple hypothesis ignores the obvious fact that the only action which could affect a taxpayer's pocketbook is an increased revenue derived from taxes, part of which he must pay; an exemption of another from a tax may, or may not have that effect. There is no evidence in the record here that the exemption operated to increase anyone's taxes. Moreover, the statute involved leaves the Board of Supervisors of Alameda and other counties free to raise revenue from various sources. The tax rates on the secured roll are arrived at only after the "total appropriations and reserves" are reduced by "the amount of estimated revenue from other sources" and "available surplus."[1]

It is not enough for a party to ask this Court to "*guard against the possibility*" that a taxing authority will exercise its discretion in such a way as to cause

[1]Section 29120 provides:

that the rates fixed by the board "shall be such as will produce . . . the amount found by deducting from the total appropriations and reserves:

(a) The amount of estimated revenue from other sources.

(b) Available surplus."

injury to him. *Public Service Commission* v. *Wycoff Co.*, 344 U. S. 237, 244 (1952). It is not enough that a threat of injury by a board or agency be implied by the existence of laws which it is empowered to effectuate. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 91 (1946). "Conflicts of interest must be 'ripe for determination' . . . must not be nebulous or contingent but must have taken on fixed or final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries . . ." *Public Service Commission* v. *Wycoff Co., supra*, at p. 244. See also *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945).

The deficiences which existed in respect to the standing of the original plaintiff, Lundberg, are accentuated by the addition of the present appellant, Heisey, after the decision in the California Supreme Court. Although he was added as a plaintiff-appellant in the California courts (Jur. St., App. D) there are no findings as to his position, such as there were as to Lundberg (Jur. St., App. B, pp. 21-22). All that appears in the record is his *ex parte* motion, supported by an affidavit containing a bare allegation that appellant owns real and personal property in the County of Alameda, the value of which is not specified, and has paid taxes there since 1950. That this *ex parte* allegation may suffice in California courts is not enough to show that it would suffice here. *Doremus* v. *Board of Education, supra.*

CONCLUSION

Wherefore, the motion to dismiss the appeal should be granted.

Respectfully submitted,

J. F. COAKLEY,
District Attorney of the County of Alameda,

R. ROBERT HUNTER,
Chief Assistant District Attorney,

RICHARD J. MOORE,
Deputy District Attorney,

MAURY ENGEL,
Deputy District Attorney,
Attorneys for Defendant and Appellee County of Alameda.

JOHN W. COLLIER,
City Attorney of the City of Oakland,

ROBERT E. NISBET,
Deputy City Attorney,
Attorneys for Defendant and Appellee City of Oakland.

EDMUND G. BROWN,
Attorney General of the State of California,

CLARENCE A. LINN,
Assistant Attorney General,
Attorneys for Defendants and Appellees.

FILED
OCT 29 1956
JOHN T. FEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,

Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,

Appellees.

MOTION TO DISMISS APPEAL

and

SUPPORTING BRIEF.

ANDREW F. BURKE,
1408 Hobart Building, San Francisco 4, California,
Attorney for The Roman Catholic Welfare Corporation of San Francisco, a (California) corporation, Intervenor-Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Page

I. Nature of Cause 3

II. Statement of Facts 3

III. Questions Presented by the Appeal 12

IV. Summary of Argument 14

V. Argument 18

A. Appellant's Contentions do not Present a Judiciable "Case" or "Controversy" within the Jurisdiction of the Court, because the Record Fails to show that Appellant has Sustained or is in Immediate Danger of Sustaining any *Direct* Injury (in the Nature of a Money Loss) from the Operation of the Exemption Granted by the Challenged Statute 18

B. Appellant's Contention Based upon the First Amendment does not Present a *Substantial* Federal Question 24

1. The "Establishment of Religion" Clause of the First Amendment does not Justify (Much Less Require) Antagonism to Religion or Religious Institutions 24

2. The so-called religious schools serve a public purpose and promote the "public welfare" .. 26

3. The challenged Statute was Enacted for the *Public* Purpose of Aiding *Education*, and, thus, Promoting the General Welfare; the Benefit which the Private Schools *which Teach Religion* (in Common with *Private* Schools which do *not* Teach Religion) Derive from its Operation is an *Incidental* and *Consequential* Benefit, only, which does not Bring it within the Prohibition of the "Establishment of Religion" Clause of the First Amendment 27

4. The Principles Mentioned Above are Particularly Applicable to Statutes which Grant *Tax*

Page

Exemptions to Churches, Religious Schools or Other Religious organizations 30

(a) Tax exemption was granted to churches and religious schools by the colonies, and by certain states prior to the adoption of the First Amendment and has been granted by other states and by the Federal Government since shortly after the adoption of the First Amendment and has always been recognized as a legitimate and proper exercise of legislative power. Therefore, (in the absence of specific language evidencing a contrary intent—and there is none such) a tax exemption should not be considered as being within the philosophy or purpose of the prohibition of laws "respecting an establishment of religion" contained in the First Amendment 30

(b) Exemptions from taxes have never been regarded as *grants* of *public* property, within the operation of state constitutional provisions, similar in form or substance to the "establishment of religion" clause of the First Amendment or state constitutional provisions, which prohibit *grants* of *public* property to *sectarian* organizations or for *sectarian* purposes nor as compulsory "support" by citizens of churches of which they were not members, contrary to constitutional provisions prohibiting such compulsory support 32

(c) If we assume that a tax exemption granted to *religious* schools, *if made for the primary purpose of aiding religion*, would violate the "*establishment of religion*" clause of the First Amendment, such result cannot properly be claimed for the

Page

tax exemption granted by the challenged statutes, to *religious* schools, because the *primary* purpose of the exemption (which is granted to *religious* and *non-religious* schools alike) is *not* to aid *religion* but rather *to aid secular education* and, thus, to promote the "general welfare" 36

5. There is Nothing in *Everson v. Board of Education*, 330 U. S. 1, which is inconsistent with the Views Expressed Above 37

C. None of the Appellant's Contentions, Based Upon the "Due Process" and/or the "Equal Protection" Provisions of the Fourteenth Amendment Presents a "Substantial" Federal Question or Possesses any Merit 37

1. Neither the "Due Process" nor the "Equal Protection" Provisions of the Fourteenth Amendment, Considered Alone, Imposes any Restriction upon the Power of a State to Grant such Tax Exemptions as it may Deem Proper 38

2. There is no Merit in Appellant's Various Contentions by which he Seeks to show that the Challenged Statute Violates his Rights under the "Equal Protection" and "Due Process" Provisions of the Fourteenth Amendment .. 38

(a) There is no merit in appellant's contention (based upon Brown v. Board of Education, 347 U. S. 483) that the challenged statute violates the "equal protection" provision of the Fourteenth Amendment, by failing to make education "available to all on equal terms" 38

(b) There is no merit in appellant's contention (based upon his assertions that *religious* schools are in "competition" with *public* schools and do not serve a *public* pur-

Page

pose), that the exemption of *religious* schools, increases his taxes and takes his property for a *non-public* purpose..... 39

(c) Appellant's contention that the challenged statute violates the California Constitution, because it exempts property "without a specific constitutional authorization", raises no *federal* question, but a *state* question only, which is foreclosed by the judgment of the Supreme Court of California 39

3. Appellant's Contentions that the Superior Court of Alameda County and the Supreme Court of California Erred in Rejecting the Original Plaintiff's Proffer of Evidence Respecting the Religious Doctrines Taught in the Catholic Schools of California, and that the Supreme Court Erred in Refusing to Make Findings in Favor of the Original Plaintiff on the Basis of the Rejected Evidence do not Present *Federal* Questions, but *State* Questions Only, Based Upon Rulings in Respect of *State* Practice, and are Foreclosed by the Judgment of the Supreme Court of California 40

VI. Conclusion 42

Table of Authorities Cited

Cases	Pages
Alabama Federation of Labor v. McAdory, 325 U. S. 451	23
Baltimore City v. Minister and Trustees of Starr Methodist Protestant Church, 106 Md. 281; 67 A. 261	34
Barrington v. Missouri, 205 U. S. 483; 51 L. ed. 890; 27 S. Ct. 582	40
Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232	21, 28
Board of Education v. Illinois, 203 U. S. 553	28
Board of Education of Baltimore County v. Wheat, 174 Md. 314; 199 Atl. 628	35
Brown v. Board of Education, 347 U. S. 483; 98 L. ed. 873; 74 S. Ct. 686	16, 17, 27, 38, 39
Carmichael v. Southern Coal Company, 301 U. S. 495; 81 L. ed. 1245; 57 S. Ct. 868	12, 15, 28
Chapman & Dewey Lord Company v. Bigelow, 206 U. S. 41; 51 L. ed. 953; 27 S. Ct. 679	40
Cochran v. Louisiana State Board of Education, 281 U. S. 370; 74 L. ed. 913; 50 S. Ct. 335	15, 26, 28, 37
Collins v. Johnston, 237 U. S. 502	41
Commonwealth v. Board of Education of Methodist Episcopal Church, 167 Ky. 619; 179 S. W. 576	37
Doremus v. Board of Education, 342 U. S. 429; 96 L. ed. 475; 72 S. Ct. 394	14, 18, 19, 20
Everson v. Board of Education, 330 U. S. 1; 91 L. ed. 711; 67 S. Ct. 504	14, 15, 16, 25, 26, 28, 29, 37
Franklin Street Society v. Manchester, 70 N. H. 342	31
Garrett Biblical Institute v. Elmhurst State Bank, 331 Ill. 308; 163 N.E. 1	34
Heisey v. County of Alameda, 46 A.C. 648; 298 P. 2d 1	3, 6, 39
Holy Trinity Church v. United States, 143 U. S. 457; 36 L. ed. 226; 12 S. Ct. 511	25

Pages

Lisenba v. California, 314 U. S. 219; 86 L. ed. 166; 62 S. Ct. 280 41
Los Angeles Farming and Milling Company v. Los Angeles, 217 U. S. 217; 54 L. ed. 736; 30 S. Ct. 452 40
Lundberg (Heisey) v. County of Alameda, 46 A. C. 648; 298 P. 2d 1 ..... 3, 6, 39

Massachusetts v. Mellon, 262 U. S. 447 18
Metropolitan Street Railway Co. v. New York State Board of Tax Commissioners, 199 U. S. 1, 50 L. ed. 65, 25 S. Ct. 705 21

Neblett v. Carpenter, 305 U. S. 297; 83 L. ed. 182; 59 S. Ct. 170 41

Pierce v. Society of Sisters, 268 U. S. 519; 69 L. ed. 1070, 45 S. Ct. 71 ..... 26, 27
Public Service Commission v. Wycoff Co., 344 U. S. 237 23

Ruff v. Teets, 235 F. 2d 674 41

State v. Collector of Jersey City, 24 N. J. Law 108 ..... 31, 32

Tilley v. County of Cook, 143 U. S. (Otto) 155 11
Trustees of Griswold College v. State of Iowa, 46 Iowa 275 34
Trustees of Kentucky Female Orphan School v. City of Louisville, 100 Ky. 470; 36 S. W. 921 34
Trustees of Methodist Episcopal Church v. City of Atlanta, 76 Ga. 181 34

United Public Workers v. Mitchell, 330 U. S. 75 23
United States ex rel Darcey v. Handy, 224 F. 2d 504 41

Williams v. Baltimore, 289 U. S. 36 21
Williams v. Riley, 280 U. S. 78; 74 L. ed. 175; 50 S. Ct. 63 19

Zorach v. Clauson, 343 U. S. 306; 96 L. ed. 954; 76 S. Ct. 679 25

Constitutional and Statutory Provisions

United States Constitution: Pages

Article III, Sec. 2 18
First Amendment ...3, 6, 13, 14, 16, 25, 30, 32, 33, 35, 37, 38, 39
Fourteenth Amendment 3, 6, 13, 16, 37, 38, 41

Ordinance for the Government of the Northwest Territory .. 24

California Constitution:
Article XIII, Sec. 1c 4, 5, 7

Education Code, Sec. 16601 12

Education Code, Sec. 16624 12

Government Code, Secs. 29040; 29060; 29061; 29070; 29071; 29091; 29120 23

Revenue and Taxation Code, Sec. 214 4

Other States:

Delaware, Constitution of 1792, Sec. 1 of Article I 33

Georgia, Constitution of 1798, Sec. 10 of Article IV 33

Kentucky, Constitution of 1799, Sec. 3 of Article X 33

Maryland, Constituiton of 1802, Article XXXIII 33

Massachusetts, Constitution of 1780, Article III 33

New Hampshire, Constitution of 1792, Article VI 33

New Jersey, Constitution of 1776, Article XVIII 33

New York, Constitution of 1777, Article XXXV 33

North Carolina, Constitution of 1776, Article XXXIV 33

Pennsylvania, Constitution of 1790, Article III 33

Tennessee, Constitution of 1796, Sec. III of Article XI 33

Vermont, Constitution of 1793, Article III 33

Virginia, Bill for Religious Liberty:
Statutes of (Hening) 1823 34
Statutes at Large, Shepherd's Cont. of Hening, pp. 149, 200 34

Texts and Other References

Page

Adler, Historical Origin of the Exemption from Taxation of Educational Institutions, etc. (1922), p. 74 31

American Juris. (Public Funds), Vol. 42, Sec. 56, p. 757 27

Conrad, Constitutions of the United States (1804) 33

Cooley, Constitutional Limitations, pp. 470, 471 35

Story, Commentaries on the Constitution, Vol. 8, Sec. 1868, p. 726 24

Torpey, Judicial Doctrines of Religious Rights in America (1948), p. 173 32

Zollman, American Church Law (1933), pp. 329-30 32

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,

Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,

Appellees.

MOTION TO DISMISS APPEAL.

To Paul W. Heisey, Appellant in the Above Entitled Cause, and to Henry C. Clausen, His Attorney:

The Roman Catholic Welfare Corporation of San Francisco, a (California) corporation, intervenor-appellee in the above entitled cause, moves the Court to dismiss, with costs, the appeal of appellant Paul W. Heisey from the judgment of the Supreme Court of the State of California, in said cause, upon the grounds that said appeal (1) does not present a judiciable case or controversy within the jurisdiction of the Court, and (2) does not present a substantial Federal question.

Dated, San Francisco, California,
October 23, 1956.

ANDREW F. BURKE,
Attorney for The Roman Catholic Welfare Corporation of San Francisco, a (California) corporation, Intervenor-Appellee.

BRIEF IN SUPPORT OF MOTION.

I. NATURE OF CAUSE.

The appeal herein is from a final judgment of the Supreme Court of California (46 A. C. 648; 298 P. 2d 1) which upheld the constitutional validity of a state statute which granted tax exemption to *private, non profit* "schools of less than collegiate grade." It is contended by the appellant that, insofar as the exemption applies to schools (of the character mentioned) *in which religion is taught,* the statute granting it constitutes an "establishment of religion" contrary to the First Amendment to the Federal Constitution, the provisions of which are claimed to be incorporated in the due process clause of the Fourteenth Amendment. In addition, appellant contends that the statute violates his rights under the "due process" and "equal protection" provisions of the Fourteenth Amendment, in various ways, hereinafter discussed.

The appellant was not a party to the action in the trial Court. He was brought into the action as an *additional* party plaintiff by *ex parte* order made after the death of the *original* plaintiff, which occurred after the judgment of the Supreme Court of California had been rendered.

II. STATEMENT OF FACTS.

At the general election of November 7, 1944, the electors of California approved an amendment to the

State Constitution (numbered Section 1c of Article XIII) which authorized the legislature to "exempt from taxation all or any portion of the property used exclusively for religious, hospital, or charitable purposes and owned by . . . corporations organized and operated for religious, hospital or charitable purposes, not conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual." This constitutional provision will be, hereinafter, called the "Enabling Act."

To carry out the provisions of the Enabling Act, the Legislature of California, at its 1945 session, enacted Section 214, Revenue and Taxation Code, by which it granted tax exemption to hospitals and various other types of institutions. However, the section expressly provided that the granted exemption should not enlarge the *college* exemption (theretofore granted by the State Constitution), nor grant exemption to "schools of less than collegiate grade". At its 1951 session, the Legislature amended said Section 214 by striking from it the provision that the exemption should *not* apply to "schools of less than collegiate grade", and by adding to it a provision that the exemption should include the property of *private, non profit* "schools of less than collegiate grade". It is this latter provision which gives rise to the present controversy. As amended, the pertinent portion of the code section reads as follows:

> "Property used exclusively for *school purposes of less than collegiate grade* and owned and operated by religious, hospital or charitable funds,

foundations or corporations which property and funds, foundations or corporations meet all of the requirements of this section, shall be deemed to be within the exemption provided for in Section 1c of Article XIII of the Constitution of the State of California and this Section."

(The "requirements" of the *private, non profit* character of the exempted schools are set up on other portions of the Code Section, which, in its entirety, is set forth on pages 3-5 of Appellant's "Statement as to Jurisdiction.")

After its adoption by the Legislature, the amended statute was submitted to the electors on referendum and was approved by them. Thereupon, one Alfred J. Lundberg commenced a suit in the Superior Court of the State of California, in and for the County of Alameda, against said County, the City of Oakland therein, and certain officers of the County and the City, to enjoin the defendants from granting tax exemption to *any* schools of the character mentioned in the statute. The suit purported to be a representative or class suit. The complaint alleged that it was brought by the plaintiff as a citizen, resident and taxpayer of the defendant County and defendant City, not only on his own behalf but, also, on behalf of all other citizens, residents and taxpayers in said County and said City. The complaint alleged (and the plaintiff contended) that the statutory grant of exemption to "schools" was unconstitutional as against *all* schools affected by it, upon the grounds that the Enabling Act (1) did not authorize the Legislature to

grant exemption to *any* "schools", and (2) violated various provisions of the California Constitution.

As applied to schools in which religion is taught, the plaintiff alleged and contended that the challenged statute was unconstitutional for the additional reason that it violated the "establishment of religion" clause of the First Amendment to the Federal Constitution which he claimed to be applicable to the states under the Fourteenth Amendment, and that it otherwise violated his rights under the "due process" and "equal protection" provisions of the Fourteenth Amendment.

The intervenor appellee, which is the owner and operator of schools of the character mentioned in the challenged statute, by leave of court, intervened in the suit, on the side of the defendants, and, by its counsel, participated in the trial of the suit and in all subsequent proceedings therein.

A three judge court tried the suit. Two of the three judges awarded judgment to plaintiff, upon the *California* constitutional grounds urged by him, ***but declined to pass upon the Federal questions raised against schools which teach religion.*** The third judge found against the plaintiff on both the California and the Federal questions. On motion of the plaintiff, the majority Judges struck from the files the judgment of the dissenting Judge. Upon appeal by the defendants and the intervenor from the judgment of the majority Judges, the Supreme Court of California on June 6, 1956, reversed said judgment. (46 A.C. 648, 298 P.2d 1.)

The Court, also, (on the ground that they had been rendered moot by its decision on the main appeal) dismissed certain subsidiary appeals.[1]

In its judgment, the Supreme Court of California held (1) that the exemption granted by the challenged statute to private non profit "schools of less than collegiate grade was authorized by the above mentioned Enabling Act (i.e., Section 1c of Article XIII); (2) that the statute did *not* violate any of the other provisions of the California Constitution invoked by the plaintiff, *because all of them were controlled by the (later) provisions of the Enabling Act;* and (3) that in so far as it applied to schools which teach *religion,* the challenged statute did not violate the Federal Constitution. A petition for a rehearing followed, and was denied.

On June 14, 1956 (eight days after the decision of the Supreme Court of California was rendered), Mr. Lundberg, the plaintiff in the action died. Later, by *ex parte* orders, pursuant to *ex parte* motions, made in the Superior Court and in the Supreme Court of

[1]These appeals were (1) appeals by the defendants and the intervenor from the order of the majority Judges which had struck from the files, the dissenting judgment of the third Judge, and (2) an appeal by the *plaintiff* from the judgment of the third (i.e., dissenting) Judge. The appeal mentioned in (2) was taken pursuant to Rule 3(b) of the Rules on Appeal of the Supreme Court of California which provides that if a judgment is set aside and an appeal is taken from the order setting it aside, the party against whom said judgment was rendered may appeal from it. Thus, the net result of the order of the Supreme Court dismissing the subsidiary appeals was to leave intact the order of the majority Judges which had stricken the dissenting judgment from the files and to leave the judgment of the majority Judges as the *sole* judgment of the *trial* Court.

California, Paul W. Heisey, the appellant herein, was brought into the suit in both Courts as an *additional* party plaintiff, upon the ground (shown, only, by his *ex parte* affidavit) that he was one of the unnamed and indefinite number of the class for whom the original plaintiff purported to bring the suit as alleged in his complaint. Said Paul W. Heisey is the *only* appellant herein. No personal representative of the original (deceased) plaintiff, Mr. Lundberg, is an appellant.

It was shown upon the trial, that, in accordance with the challenged statute, applications for tax exemption in the fiscal year 1953-54 were duly filed on behalf of *708* private non profit "schools of less than collegiate grade"; that of these *473* were schools conducted under the auspices of the Catholic Church, and that religion was taught in them; that of the remaining *235* schools, many (the exact number not being shown) *were conducted under the auspices of other religious creeds and that religion was taught in them*, and that still others were conducted under non-religious auspices and religion was *not* taught in them. It was further shown that in the *708* schools which had applied for exemption, *232,083* pupils were being educated, of whom *206,023* attended Catholic schools and *26,060* attended the other schools (some *religious*, and some *non-religious*). (We use the terms "religious" and "non-religious", solely, to distinguish between schools which *do* teach religion, and schools which do *not* teach religion).

The evidence also showed that the total amount of taxes paid in the fiscal year 1952-53 (ending June 30, 1953) in respect of *all* schools in California which had applied for tax exemption under the challenged statute was *$1,123,882.88,* and that of this amount *$900,763.11* (80.1%) was paid in respect of the Catholic schools. Thus, it appeared that *if* the tax rate and the assessed valuation of the interested schools would be approximately the same in the succeeding fiscal year 1953-54 (commencing July 1, 1953), in which exemption was claimed, the total tax loss throughout the entire state *if all the claims for exemption were allowed in toto* would be somewhat less than *$1,124,000.00.* (The trial was concluded before the tax rates and assessments for the fiscal year 1953-54 were finally fixed and before the tax officers had passed upon the applications for exemption from the taxes of said fiscal year, and so the record does not show the total amount of the taxes involved in the claims for exemption which were finally *allowed.* It may be fairly assumed, however, that with the *total denial* of some claims for exemption and the *partial denial* of others, the total amount of the taxes lost *throughout the entire state* by reason of the exemptions which were allowed would be less than $1,000,000.00, and in Alameda County would be less than $74,000.00.

It was shown upon the trial by the Assistant Assessor of the defendant Alameda County that the assessed valuation of the property of the original plaintiff, Mr. Lundberg, in Alameda County, for the

fiscal year 1952-53 (in which the trial was had and which ended June 30, 1953) was $12,425.00, and that in respect of said property he had paid in said fiscal year taxes amounting to $905.10. It was, also, shown upon the trial, by said Assistant Assessor, that *if* in the ensuing fiscal year the tax authorities should increase the taxes on *non-exempt* property, to raise the tax moneys lost through the exemption, Mr. Lundberg's total tax increase would amount to *$1.83* only. ***It should be pointed out, however, that there is no evidence in the record of any increase of taxes on non-exempt property as a result of the exemption.***

Inasmuch as Mr. Heisey was not a party to the action in the trial Court and did not become a party to it until after the death of the original plaintiff, and after the rendition of the judgment of the Supreme Court of California, the record is silent with respect to whether or not he paid any taxes to either the City of Oakland or the County of Alameda in *any* fiscal year, or the amount of *any* such taxes, if he ever paid *any*. Of course, the record does not show that the taxes of the appellant were increased as the *direct* (or *any)* result of the exemption. We stress this fact at this time, because, later, we make it the basis of an argument against the jurisdiction of the Court.

It is apparent, of course, that the schools to which the exemption applies, *annually,* save the State of California millions of dollars, *by educating without cost to the State, the more than 232,000 pupils who attend such schools.* In this connection, the intervenor-appellee offered, on the trial, to prove that if

to the number of schools affected by the exemption and the number of pupils educated in them, there should be applied the various integers of cost, used by California *public* school authorities to determine the cost of education, in the *public* schools of the state, it would be found that the exempted schools, in the fiscal year in question, would save the State many times the tax loss resulting from the exemption. This offer of proof was rejected by the trial Court *upon objection by the plaintiff*. Under familiar principles, however, it must be presumed, on appeal, that the matters included in the offer of proof could have been proved, and, consequently, that they must be regarded as proved.

> ("The offer of the plaintiff to prove certain facts having been rejected, he must be presumed to be able to prove what he offered to prove. We must, therefore, assume that the custom which he offered to prove did, in fact, exist." [*Tilley v. County of Cook*, 103 U.S. (Otto) 155, 164].)

On the trial, the plaintiff made no attempt to show the extent to which religion was taught in any of the *religious* schools, other than those conducted under Catholic auspices, and there is no evidence in the record upon that subject in so far as the other religious schools are concerned. With respect to the Catholic schools, it was shown that, in them, approximately *20* minutes per day were devoted to the teaching of the dogmas and tenets of the Catholic Church. It was further shown that said schools maintained a curriculum of *secular* education which measured up to the

State's standards for the *public* schools of the State. This latter requirement had to be met by *all* exempted schools as a condition to receiving the exemption. In fact, no *private* school may operate in California which does not meet this requirement. Section 16,601 of the Education Code of the State requires *all* children of school age to attend "*public* full time day schools" of the State, unless exempted from the requirement. Children attending *private* schools are exempted from the requirement of Section 16,601 *only* if they, and the schools attended by them, satisfy the requirements of Section 16,624 of the Education Code which reads, in part, as follows:

> "Children who are being instructed in a *private, full-time,* day school by persons capable of teaching shall be exempted. Such school shall be taught in the English language and shall *offer instruction in the several branches of study required to be taught in the public schools of the State.*"

III. QUESTIONS PRESENTED BY THE APPEAL.

As stated in *Carmichael v. Southern Coal Company,* 301 U.S. 495, 507, 81 L.Ed. 1245, 57 S.Ct. 868, (1937) the judgment of the Supreme Court of California has "put to rest" all questions based upon *California* Constitutional or statutory grounds. Because of this fact, the only questions presented by the pending appeal are, *first,* whether in the circumstances disclosed by the record the appellant's claim presents a judiciable "case" or "controversy" within the jurisdiction of the court, and *second,* whether the

exemption granted by the statute *as applied to private non profit "schools of less than collegiate grade" in which religion is taught* violates the "establishment of religion" clause of the First Amendment or the "due process" or "equal protection" provisions of the Fourteenth Amendment.

In the light of the facts disclosed by the record, the questions mentioned may be stated as follows:

1. May a person who claims to be a taxpayer of a county or a municipal corporation of a state assail the constitutionality of a state statute which exempts certain property from taxation, in the absence of a showing that he has sustained or is in immediate danger of sustaining a *direct* injury (in the nature of a money loss) from the operation of the exemption; and

2. Does a statute which, *in order to aid education*, and, thus, to promote the *public* welfare, grants tax exemption to private non profit schools, violate the "establishment of religion" clause of the First Amendment, or the "due process" or "equal protection" provisions of the Fourteenth Amendment, in so far as it applies to schools of the character mentioned, *which are conducted under religious auspices and provide instruction in the dogmas and tenets of a particular religion*, notwithstanding that said schools (like the private non profit schools which do *not* teach religion) meet the State's requirements in all respects, and provide a full curriculum of *secular* education which measures up to the State's standards for the *public* schools of the State?

IV. SUMMARY OF ARGUMENT.

A. None of appellant's contentions presents a judiciable "case" or "controversy" within the jurisdiction of the Court, because the record fails to show that appellant "has sustained" or is in "immediate danger of sustaining" any *direct* injury (in the nature of a money loss) from the operation of the exemption granted by the challenged statute. For this reason appellant's contentions are controlled by the principle asserted and applied by the Court in *Doremus v. Board of Education,* 342 U.S. 429, 96 L.Ed. 475, 72 S.Ct. 394 (1952.)

B. Appellant's contention that the challenged statute offends against the "establishment of religion" clause of the First Amendment does not present a *"substantial"* Federal question for the following reasons :

(1) The "establishment of religion" clause does not justify (much less require) *antagonism* to religion.

(2) There is no merit in appellant's contentions that tax exemption to religious schools is unlawful because said schools are in "competition" with *public* schools, and do not serve a "public" purpose. That *secular* education, *in religious schools,* serves a *public* purpose has been, repeatedly, held by this Court, and it is "much too late" (*Everson v. Board of Education*) to argue to the contrary. Further-

more, any "competition" between religious schools and public schools is the *legitimate* result of the exercise of constitutional rights on the part of the religious schools, and cannot affect their right to the tax exemption granted by the challenged statute.

(3) The challenged statute was enacted for a *public* purpose (i.e., to promote secular education) and the benefits which religious schools derive from its operation are incident to and consequent upon the accomplishment of the "public" purpose and so are lawful, in accordance with the principle enunciated and applied by this Court in *Cochran v. Louisiana State Board of Education,* 281 U. S. 370, 74 L.Ed. 913, 50 S.Ct. 335; *Carmichael v. Southern Coal Co.,* 301 U. S. 495, 81 L.Ed. 1245, 57 S.Ct. 868, *Everson v. Board of Education,* 330 U. S. 1, 91 L.Ed. 711, 67 S.Ct. 504, and other cases.

(4) Tax exemption has been granted to churches, religious schools and other religious organizations in this country from the earliest colonial days; this fact furnishes an historical answer to the contention that the "establishment of religion" clause was intended to prohibit such exemption.

(5) Despite the fact that from Revolutionary days state constitutions have contained provisions similar in form or substance to the

"establishment of religion" clause of the First Amendment or provisions prohibiting aid, through tax moneys, to *sectarian* institutions, or provisions which prohibit compulsory support by a citizen of a church of which he is not a member, it has never been held that a tax exemption granted to such institutions violated any of such provisions. On the contrary, whenever the validity of such an exemption has been questioned, the decision has been in favor of its validity.

(6) There is nothing in the decision or reasoning in *Everson v. Board of Education* which is inconsistent with the views hereinabove expressed.

C. None of appellant's contentions based upon the "due process" and/or "equal protection" provisions of the Fourteenth Amendment presents a *"substantial"* federal question or has any intrinsic merit for the following reasons:

(1) Neither the "due process" provision nor the "equal protection" provision of the Fourteenth Amendment, *considered alone,* imposes any restriction upon the power of a state to grant such tax exemptions as it may deem proper;

(2) There is no merit in appellant's contention (based upon *Brown v. Board of Education,* 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954)) that the challenged statute lacks

constitutional validity because it fails to make education "available to all on equal terms"; the *Brown* case deals only with the right of citizens to *equal* educational facilities *in public schools* and is inapplicable in the present cause.

(3) There is no merit in appellant's contentions (based upon his assertions that religious schools are in "competition" with public schools and do not serve a "public" purpose) that the exemption of *religious* schools increases his taxes and takes his property for a "non-public" purpose.

(4) Appellant's contentions based upon the California Constitution do *not* present *federal* questions.

(5) Appellant's contentions that the trial Court and the Supreme Court of California erred in refusing the original plaintiff's proffer of evidence regarding religious doctrines taught in the Catholic schools of California, and that the Supreme Court of California erred refusing to make findings in favor of the original plaintiff on the basis of the proffered (but rejected) evidence do not present Federal questions.

V. ARGUMENT.

We respectfully submit (1) that the case attempted to be made by the appellant does not present a judiciable "case" or "controversy" within the jurisdiction of the Court; and (2) that no substantial federal question is presented by the appeal.

A. APPELLANT'S CONTENTIONS DO NOT PRESENT A JUDICIABLE "CASE" OR "CONTROVERSY" WITHIN THE JURISDICTION OF THE COURT, BECAUSE THE RECORD FAILS TO SHOW THAT APPELLANT HAS SUSTAINED OR IS IN IMMEDIATE DANGER OF SUSTAINING ANY DIRECT INJURY (IN THE NATURE OF A MONEY LOSS) FROM THE OPERATION OF THE EXEMPTION GRANTED BY THE CHALLENGED STATUTE.

Under Section 2 of Article III of the Federal Constitution, the judicial power of the Courts of the United States is limited to "cases" or "controversies". Unless then the claim asserted by a litigant presents a "case" or "controversy" it is not judiciable in any Court of the United States. The essentials of a judiciable "case" or "controversy" are clearly set forth in *Doremus v. Board of Education,* 342 U.S. 429, 96 L.Ed. 475, 72 S.Ct. 394 (1952), wherein the Court pointed out that the test of the jurisdiction of a Federal Court in a taxpayer's suit involving the application of tax moneys, is the same when a State statute is involved as when a *Federal statute* is involved. It then approved the jurisdictional test adopted in *Massachusetts v. Mellon,* 262 U.S. 447, wherein the Court, speaking of the invocation by a taxpayer of the

power of a Federal Court to enjoin the enforcement of a tax statute, said (262 U.S. p. 488):

> "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

In *Doremus*, the Court further held that the "direct" injury which a taxpayer must show in order that he may invoke the power of this Court to enjoin an alleged misuse of the taxing power must be a *pecuniary* loss, involving the exaction from the taxpayer of moneys which he would not have had to pay except for the enforcement of the statute of which he complains. In this connection the Court said (342 U.S. 434):

> "The taxpayer's action can meet this test, but only when it is a good-faith pocketbook action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference."

In *Williams v. Riley*, 280 U.S. 78, 74 L.ed. 175, 50 S.Ct. 63 (1929), the complainant sought, in a District Court of the United States, to enjoin the enforcement by the defendant (Controller of the State of California), of a state law imposing a gasoline tax. The Court dismissed the bill, whereupon the complainant appealed. This Court affirmed the judgment of the District Court and said (280 U.S. 79):

> "Appellants may not undertake to test the validity of the questioned acts by a proceeding of this character. *Frothingham v. Mellon, Sec'y of the Treasury*, 262 U.S. 447, 487, 488, announces the applicable doctrine.
>
> 'The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing is essentially a matter of public and not of individual concern.'
>
> The federal courts have no power *per se* to review and annul acts of state legislatures upon the ground that they conflict with the federal or state constitutions. 'That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.'"

Except for a recital in the *ex parte* order which brought him into the action as an "additional" plaintiff, there is no evidence in the record to show that appellant is or ever was a resident and taxpayer of the defendant city or defendant county. But more than this, there is no showing of any *direct pecuniary loss* to the appellant resulting from the exemption granted by the challenged statute.

As was the fact in *Doremus* (342 U.S. 429, 433) so is it the fact here that "No information is given as to what kind of taxes are paid by appellant". Again, paraphrasing *Doremus* (p. 433), "there is no averment that the exemption complained of in the present case increased any tax that appellant pays or that as

a taxpayer he is, will, or possibly can be out of pocket because of it".

A grant of exemption, without more, may not be attacked by a taxpayer.

In *Metropolitan Street Railway Co. v. New York State Board of Tax Commissioners*, 199 U.S. 1, 50 L.Ed. 65, 25 S.Ct. 705 it is said (p. 47):

> ". . . there is nothing in the Federal Constitution to prevent a state from granting exemption from taxation." (Citing *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U.S. 232.)

In the case cited, the Court said (134 U.S., p. 237):

> ". . . The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions."

> "It is not the function of a Court to determine whether the public policy which finds expression in [an exemption from taxation] is well or ill conceived." (*Williams v. Baltimore*, 289 U.S. 36, 42 (1933).)

The appellant has not suffered any direct pecuniary loss through the operation of the exemption, *considered by itself*. It is only upon the theory that the amount of the exempted taxes must, *necessarily*, be made up by *increased* taxes from other taxpayers,

that any claim of a pecuniary loss to appellant could be justified. *But the record contains no averment or evidence of any increase of taxes to the appellant, or anything to show that an increase of taxes has resulted or will result to him from the exemption.* Indeed, it may well be that there will be no need on the part of defendants, County and/or City, to recoup the tax loss resulting from the exemption.

Furthermore, any increase in the appellant's taxes that may occur, *would not result from the granted exemption per se,* but would result entirely from the *independent* action of the taxing authorities of the County of Alameda and the City of Oakland.

As heretofore pointed out, at the time of the trial (June 4, 5, 1953) neither the assessment roll nor the tax rate for the fiscal year 1953-54 (which commenced July 1, 1953) had been adopted by the defendant city or the defendant county. At the time of the trial, it was not known and could not be known what would be the amount of the taxes of any taxpayer in such fiscal year. Thus, there is nothing in the record to show that the taxes of the appellant were increased in said fiscal year as a direct result of the exemption or that they will be increased in the future as a direct result of the exemption. Consequently, there is no evidence in the record to show that the appellant has suffered or will suffer any *direct* pecuniary loss as a result of the exemption.

The amount of taxes levied against a taxpayer is fixed by the application of (1) an assessment roll of taxable values made up by *one* city or county taxing

official (i.e., the *assessor*), to (2) a tax rate set by *other* taxing authorities (i.e., the *City Council* and the *County Board of Supervisors;* respectively) and is dependent upon the ascertainment of the "estimated" revenue from [all] sources, including *new* as well as *old* "sources", and any existing "surplus".[2] Assessment values and tax rates are dependent upon circumstances existing at the time they are adopted and have no *necessary* relation to any exemption granted by the people in their sovereign capacity. Indeed, the tapping of *new* sources of revenue and/or the existence of available "surplus" may make it unnecessary to increase the taxes on *old* sources of revenue.

A claim of injury which may serve as the basis of a "case" or "controversy", must be more than a "possibility". It must be more than a threat implied by the mere existence of laws which, if availed of, might cause injury. In short, the "injury" necessary to a "case" or "controversy" may not be "nebulous" or "contingent". (*Public Service Commission v. Wycoff Co.,* 344 U.S. 237, 244 (1952); *United Public Workers v. Mitchell,* 330 U.S. 75, 91 (1944); *Alabama Federation of Labor v. McAdory,* 325 U.S. 451, 465 (1945).

We submit, therefore, that the appellant failed to show that he has suffered or is "in immediate danger" of suffering any *direct* pecuniary loss, as a result of the operation of the exemption of which he com-

---

[2]The procedure for (1) fixing of the tax budget, (2) the assessment of the various "sources" of revenue, and (3) the fixing of the tax rate, are set forth in Sections 29040, 29060, 29061, 29070, 29071, 29091, and 29120, of the Government Code of California (1952).

plains, and, therefore, his claim that the exemption is invalid, does not present a judiciable "case" or "controversy", of which the Court has jurisdiction.

B. APPELLANT'S CONTENTION BASED UPON THE FIRST AMENDMENT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

For many reasons, hereinafter stated and discussed, appellant's contention, based upon the First Amendment, fails to present a substantial Federal question.

1. THE "ESTABLISHMENT OF RELIGION" CLAUSE OF THE FIRST AMENDMENT DOES NOT JUSTIFY (MUCH LESS REQUIRE) ANTAGONISM TO RELIGION OR RELIGIOUS INSTITUTIONS.

For from requiring (or even justifying) a spirit of antagonism to religion on the part of the government the religion clauses of the First Amendment should be given a benevolent construction, that will reflect a sympathetic view toward religion—that is religion generally as distinguished from a particular sect or faith. In this connection, it is well to keep in mind that the 1787 Ordinance for the Government of the Northwest Territory stated in Article 3 "that *religion,* morality and knowledge [are] necessary to good government and the happiness of mankind" and that in his "Commentaries on the Constitution" (1833) Mr. Justice Story wrote (Vol. 3, sec. 1868, p. 726):

> "Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the uni-

> versal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation."

The sentiments of the American people have not changed through the years. They have always had a high reverence for religion.

See *Holy Trinity Church v. United States,* 143 U.S. 457, 465, 36 L.Ed. 226, 12 S.Ct. 511 (1892) and *Zorach v. Clauson,* 343 U.S. 306, 313, 96 L.Ed. 954, 76 S.Ct. 679 (1952).

In *Everson v. Board of Education,* 330 U.S. 1, 91 L.Ed. 711; 67 S.Ct. 504 (1947), the Court said (330 U.S. p. 18) that it was "not the purpose of the First Amendment" to make it "more difficult for [religious] schools to operate", and continued as follows:

> "The Amendment requires the state to be a *neutral* in its relations with groups of religious believers and non-believers; *it does not require the state to be their adversary.* State power is no more to be used so as to handicap religions than it is to favor them."

The atmosphere in which the religion clauses of the First Amendment were considered and adopted, as stated above, and the reverence of our people for religion, as shown through the years and as recog-

nized by this Court, forbid that these clauses be considered to reflect an antagonism between government and religion.

2. THE SO-CALLED RELIGIOUS SCHOOLS SERVE A PUBLIC PURPOSE AND PROMOTE THE "PUBLIC WELFARE".

In his argument contained in the "Statement as to Jurisdiction" counsel for appellant asserts (p. 24) that *private* schools in which religion is taught, do not serve a "public" purpose, notwithstanding that they provide a full curriculum of *secular* education which measures up to the state's requirements for its public schools. This assertion obviously ignores the fact that this Court in *Pierce v. Society of Sisters,* 268 U.S. 510, 69 L.Ed. 1070, 45 S.Ct. 71, has put this matter beyond the realm of controversy, and that this Court in *Cochran v. Board of Education,* 281 U.S. 370, 74 L.Ed. 913, 50 S.Ct. 335 (1930) and *Everson v. Board of Education, supra* held that the schools involved in these cases (which were religious schools) were promoting the "public welfare" by providing a secular education for their students. It is rather late in the day, therefore, to assert or argue that such schools do *not* promote the "public welfare". In fact, this Court in *Everson* (330 U.S., p. 7) said that "it is *much too late*" to so argue. Appellant, also, (pp. 24, 27, 36, 38 of "Statement as to Jurisdiction") argues that tax exemption may not be granted to religious schools because they are in "competition" with the *public* schools. This argument overlooks the fact that religious schools have a constitutional right to exist and to educate students in religious dogma as well

as in secular matters. (*Pierce v. Society of Sisters, supra.)* From this it follows that any alleged "competition" between them and public schools is merely the *legitimate* result of the exercise of a constitutional right.

3. **THE CHALLENGED STATUTE WAS ENACTED FOR THE PUBLIC PURPOSE OF AIDING EDUCATION, AND, THUS, PROMOTING THE GENERAL WELFARE; THE BENEFIT WHICH THE PRIVATE SCHOOLS WHICH TEACH RELIGION (IN COMMON WITH PRIVATE SCHOOLS WHICH DO NOT TEACH RELIGION) DERIVE FROM ITS OPERATION IS AN INCIDENTAL AND CONSEQUENTIAL BENEFIT, ONLY, WHICH DOES NOT BRING IT WITHIN THE PROHIBITION OF THE "ESTABLISHMENT OF RELIGION" CLAUSE OF THE FIRST AMENDMENT.**

In 42 *Am. Jur.* ("Public Funds"), it is said, Sec. 56 (p. 757):

> "When a public purpose can be carried out or helped by spending public money, *the power of the legislature is not curtailed or destroyed by the fact that the money is paid to private persons who had no previous claim to it of any kind."*
>
> (Citing *Carmichael v. Southern Coal Company,* 301 U.S. 495, 81 L.Ed. 1245, 57 S.Ct. 868, with which we deal later.)

Later in the text it is said (p. 758):

> ". . . *It is the essential character of the direct object of the expenditure which must determine its validity,* and not the magnitude of the interests to be affected, or the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion."

In *Carmichael v. Southern Coal Company,* 301 U.S. 495, 81 L.Ed. 1245, 57 S.Ct. 868, this Court, after pointing out that a state had almost plenary power with respect to what property it should tax and what property it should exempt from taxation, pointed out that the Court had "often sustained the exemption of charitable institutions". (Citing *Bell's Gap R. Co. v. Pennsylvania,* 134 U.S. at 237; *Board of Education v. Illinois,* 203 U.S. 553, 563.) Further, in its opinion, the Court said (p. 518):

> *"If the purpose is legitimate because public, it will not be defeated because the execution of it involves payments to individuals. Kelly v. Pittsburgh,* supra; *Knights v. Jackson,* 260 U.S. 12, 15; cf. *Mountain Timber Co. v. Washington,* 243 U.S. 219, 239-240. 'Individual interests are aided only as the common interest is safeguarded.' See *Cochran v. Board of Education,* 281 U.S. 370, 375; cf. *Clark v. Nash,* 198 U.S. 361, 367; *Hairston v. Danville & Western Ry. Co.,* 208 U.S. 598, 608; *Noble State Bank v. Haskell,* 219 U.S. 104, 110."

It will have been noted that among the cases cited, in the above quotation, is *Cochran v. Board of Education,* in which the Court upheld the constitutionality of a statute of the State of Louisiana, which granted free text books to pupils attending *private* schools, *including schools in which religion was taught.* The *Cochran* case was cited with approval in *Everson* (330 U.S. 7), as justification for the statement that

> "It is much too late to argue that legislation intended to facilitate the opportunity of children

Continuing, the Court in *Everson* said:

> "Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. See *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 518."

The statute with which we are dealing is within the philosophy and the principle of the cases of this Court from which we have quoted. The purpose of the statute is a *public* one, namely, to promote the public welfare by "facilitating the opportunity of children to get a *secular* education." (*Everson v. Board of Education, supra*). Thus, "the essential character of the *direct* object" of the [legislation] which must determine its validity is wholly *public*. The fact that schools which teach religion, along with schools of the same class which do not teach religion, receive a consequential benefit, through the operation of the statute, does not deprive it of its *public* character or render it invalid.

It should be added that the opinion of the Supreme Court of California in the instant case cites many cases to the point that the fact that *private* persons or institutions derive an incidental or consequential benefit from the operation of a statute enacted for a *public* purpose does not affect the validity of the statute.

4. THE PRINCIPLES MENTIONED ABOVE ARE PARTICULARLY APPLICABLE TO STATUTES WHICH GRANT TAX EXEMPTIONS TO CHURCHES, RELIGIOUS SCHOOLS OR OTHER RELIGIOUS ORGANIZATIONS.

The history of tax exemptions to churches, religious schools and religious organizations generally, particularly in its relation to the religion provisions of the First Amendment and similar provisions in State Constitutions is potent evidence that such exemptions have never been regarded as unlawful aids to religion.

(a) Tax exemption was granted to churches and religious schools by the colonies, and by certain states prior to the adoption of the First Amendment, and has been granted by other states and by the Federal Government since shortly after the adoption of the First Amendment and has always been recognized as a legitimate and proper exercise of legislative power. Therefore, (in the absence of specific language evidencing a contrary intent—and there is none such) a tax exemption should not be considered as being within the philosophy or purpose of the prohibition of laws "respecting an establishment of religion" contained in the First Amendment.

In its opinion in the instant case the Supreme Court of California said (298 P.2d 1, at p. 7):

> "The practice of granting tax exemptions benefiting religious sects began in the colonial period. See Paulsen, Preferment of Religious Institutions in Tax and Labor Legislation (1949), 14 Law & Contemp. Prob. 144, 147-148; Torpey, Judicial Doctrines of Religious Rights in America (1948), ch. VI, pp. 171-174, Zollman, Tax Exemptions of American Church Property (1916) 14 Mich. L. Rev. 646, 647-650. Today, at least some tax exemption for religious groups is authorized by statutory or constitutional provisions *in every*

state and the District of Columbia, as well as by federal law. See Note (1949) 49 Columb. L. Rev. 968, 969-982."

Indeed, tax exemption for religious institutions has always existed in America. In the days of religious establishments in our country not only was the established church exempt from taxes, but the tax exemption was supplemented by tax assessments for religious purposes and for the support of the clergy. And despite the "disestablishment" of the churches after the War of Independence tax exemption to churches and religious institutions has continued to exist.

See:

Franklin Street Society v. Manchester, 60 N.H. 342, 347-8 (1880). *Adler, Historical Origin of the Exemption from Taxation of Charitable Institutions, etc.* (1922) at p. 74.

Tax exemption existed even in the absence of formal constitutional or statutory provisions authorizing it.

As pointed out in *State v. Collector of Jersey City,* 24 N. J. Law 108, 120 (1853):

"Meeting houses and school houses, *although not formally exempted by the tax laws in force prior to 1851* were seldom if ever assessed in any part of the state."

In fact, as just indicated, the first formal exemption of religious institutions in New Jersey, was made by statute in 1851. Massachusetts which always allowed exemption, provided no *constitutional* or *statutory* authority for exemption until 1837, nor did New

Hampshire until 1842 (*Zollman, American Church Law,* 1933, pp. 329-30.)

As said in *State v. Collector of Jersey City, supra,* p. 120, *it was "so entirely in accord with the public sentiment, that it universally prevailed."*

At the present time in more than two-thirds of the states the exemption is provided by self-executing constitutional provisions (*Torpey, Judicial Doctrines of Religious Rights in America* [1948] at p. 173). In other states, the tax exemption is provided by statutes enacted pursuant to constitutional authority.

If ever history afforded a basis for the proper construction of a statute or constitutional provision, the centuries old history of tax exemptions to churches, religious schools and religious organizations in our country furnishes such a construction for the "establishment of religion" clause of the First Amendment and demonstrates that it was never intended that tax exemption to churches or religious institutions should be within its ban.

(b) Exemptions from taxes have never been regarded as grants of public property, within the operation of state constitutional provisions, similar in form or substance to the "establishment of religion" clause of the First Amendment or state constitutional provisions, which prohibit grants of public property to sectarian organizations or for sectarian purposes nor as compulsory "support" by citizens of churches of which they were not members, contrary to constitutional provisions prohibiting such compulsory support.

After the Declaration of Independence, most of the colonies or states adopted *constitutional* provisions

similar in form or substance to the religion clause of the First Amendment. (See the Constitutions of the United States,—John Conrad and Co., Philadelphia, 1804.) Some of these Constitutions, in addition, contained provisions which expressly prohibited the compulsion of a citizen to pay for the "support" of a church of which he was not a member. See, for example, Art. VI of New Hampshire's Constitution of 1792 (Conrad, p. 2); Art. III of Massachusett's Constitution of 1780 (Conrad, p. 34); Art XXXV of New York Constitution of 1777 (Conrad, p. 98); Art. XVIII of New Jersey's Constitution of 1776 (Conrad, p. 107); Art. III of Pennsylvania's Constitution of 1790 (Conrad, p. 120); Sec. 1 of Art. I of Delaware's Constitution of 1792 (Conrad, p. 127); Art XXXIII of Maryland's Constitution of 1802 (Conrad, pp. 153-4); Art. XXXIV of North Carolina's Constitution of 1776 (Conrad, p. 190); Sec. 10 of Art. IV of Georgia's Constitution of 1798 (Conrad, p. 223); Art. III of Vermont's Constitution of 1793 (Conrad, p. 227); Sec. III of Art. XI of Tennessee's Constitution of 1796 (Conrad, p. 255); Sec. 3 of Art. X of Kentucky's Constitution of 1799 (Conrad, p. 310.)

As new states came into the Union may of them adopted similar constitutional provisions while others adopted provisions which prohibited *grants* of *aid* or of public property to *sectarian* organizations or for *sectarian* purposes. *Yet it has never been held that tax exemptions granted to either a church, a religious school or any other religious organization, offended against any of these state constitutional provisions.*

Virginia was in the van of the colonies which struck down religious establishments. It commenced with its "Bill for Religious Liberty", adopted in 1785 (12 Hening-Stats. of Virginia, 1823) and followed in 1799 by repealing a long list of earlier acts which retained vestiges of establishment (Va. Stats. at Large Shepherds Cont. of Hening, 149). Yet, in 1800, Virginia enacted a statute which granted complete tax exemption to all property of "houses for religious worship or seminaries of learning". (p. 200.)

The cases in which it has been contended that a tax exemption to a religious institution violated constitutional provisions prohibiting an "establishment of religion" or "support" of a church or aid to a *sectarian* institution or for a *sectarian* purpose, fortunately, are few. In the face of the universal practice, from the earliest times, of granting tax exemptions to churches and other religious institutions, few litigants have seen fit to assail the validity of such exemptions. In the few cases in which it has been contended that they are invalid, the decisions of the Courts have upheld them.

See: *Garrett Biblical Institute v. Elmhurst State Bank,* 331 Ill. 308, 163 N. E. 1 (1928). *Trustees of Griswold College v. State of Iowa,* 46 Iowa 275 (1877). *Trustees of the Methodist Episcopal Church v. City of Atlanta,* 76 Ga. 181 (1886). *Baltimore City v. Minister and Trustees of Starr Methodist Protestant Church,* 106 Md. 281, 67 A. 261 (1907). *Trustees of Kentucky Female Orphan School v. City of Louisville,* 100 Ky. 470, 36 S.W. 921 (1896).

To the above cases there should be added, of course, the decision of the Supreme Court of California in the instant case. And see, Cooley's Constitutional Limitations pp. 470, 471.

Even judges who have denied the right of religious schools to share "public benefits" recognized the fact that tax exemptions are in a class apart.[3]

In the "Statement as to Jurisdiction" counsel for appellant contends (pp. 18, 30, 32) that a tax exemption granted to a *religious* school has the effect of compelling "appellants and others similarly situated" to support a church to which they do not belong and thus violates the "establishment clause" of the First Amendment. However, at the outset of the discussion of the present point, we noted that the constitutions of many states *existing at the time of the adoption of the First Amendment* contained provisions *which expressly forbade forced support of a church by a citizen who is not a member of it.* And yet, despite such provisions, these states have always granted tax exemption to churches and religious

[3]In *Board of Education of Baltimore County v. Wheat*, 174 Md. 314, 199 A. 628 (Ct. of App., 1938) the majority of the Court upheld the validity of a statute authorizing the transportation, at public expense, of children attending private (including parochial) schools. Three judges dissented. However, the dissenting judges made the following observation (199 A. 642):

> "While the point is made, the exemption of certain property of churches and religious societies from the burden of taxation is not relevant to the questions on this record. *The exemption is firmly established and is in recognition of the importance of religion to the public welfare. Furthermore, the exemption, in final analysis, takes nothing from the funds which have been raised by taxation and is made uniform so that similar property of all sects and denominations is embraced.*"

schools and other religious organizations and have, thereby, affirmed that tax exemptions do not constitute a prohibited "support". Here, again, history effectively points the answer to counsel's argument.

(c) If we assume that a tax exemption granted to religious schools, if made for the primary purpose of aiding religion would violate the "establishment of religion" clause of the First Amendment, such result cannot properly be claimed for the tax exemption granted by the challenged statute, to religious schools, because the primary purpose of the exemption (which is granted to religious and non-religious schools alike) is not to aid religion but rather to aid secular education and, thus, to promote the "general welfare".

In its opinion in the instant case the Supreme Court of California said (298 P.2d 1, at p. 7):

> "it is apparent that the exemption was enacted *to promote the general welfare through encouraging the education of the young and not to favor religion, since it is not limited to schools maintained by religious groups but applies also to those operated by other charitable organizations.* Under the circumstances, any benefit received by religious denominations is merely incidental to the achievement of a public purpose."

It cannot be emphasized too strongly that so-called religious schools are not special or preferred objects of the exemption granted by the challenged statute. In fact, the statute contains no reference to religious schools or schools in which religion is taught. The exemption is a broad one granted to all *private non-profit schools of less than collegiate grade,* which meet the state's requirements in respect of secular education.

> *"There is no such qualifying restriction in the language giving the exemption; it speaks of 'institutions of education'—not of non-sectarian institutions of education."* (*Commonwealth v. Board of Education of Methodist Episcopal Church,* 167 Ky. 619, 179 S.W. 576 (1915).)

As was said of the free text book statute of Louisiana involved in *Cochran v. Board of Education,* 281 U.S. 370, 375 (1930), so it may be said of the challenged statute

> "Its interest is education, *broadly;* its method, comprehensive."

5. THERE IS NOTHING IN EVERSON v. BOARD OF EDUCATION, 330 U.S. 1, WHICH IS INCONSISTENT WITH THE VIEWS EXPRESSED ABOVE.

Not only is there nothing in Everson which is inconsistent with the views expressed above, but on the contrary the decision and the reasoning in Everson are wholly compatible with these views.

C. NONE OF THE APPELLANT'S CONTENTIONS, BASED UPON THE "DUE PROCESS" AND/OR THE "EQUAL PROTECTION" PROVISIONS OF THE FOURTEENTH AMENDMENT PRESENTS A "SUBSTANTIAL" FEDERAL QUESTION, OR POSSESES ANY MERIT.

In addition to claiming that the challenged statute violates the First Amendment to the Federal Constitution through the Fourteenth Amendment, appellant contends that the statute violates his rights under the "due process" and "equal protection" provisions of the Fourteenth Amendment. None of these conten-

tions presents a "substantial" Federal question, or has merit.

1. NEITHER THE "DUE PROCESS" NOR THE "EQUAL PROTECTION" PROVISIONS OF THE FOURTEENTH AMENDMENT, CONSIDERED ALONE, IMPOSES ANY RESTRICTION UPON THE POWER OF A STATE TO GRANT SUCH TAX EXEMPTIONS AS IT MAY DEEM PROPER.

We do not labor this point because we have already dealt with it somewhat at length in connection with appellant's contentions based upon the First Amendment. (See pages 30-36, *supra.*)

2. THERE IS NO MERIT IN APPELLANT'S VARIOUS CONTENTIONS BY WHICH HE SEEKS TO SHOW THAT THE CHALLENGED STATUTE VIOLATES HIS RIGHTS UNDER THE "EQUAL PROTECTION" AND "DUE PROCESS" PROVISIONS OF THE FOURTEENTH AMENDMENT.

We now deal with the various contentions of appellant based upon the "due process" and "equal protection" provisions of the Fourteenth Amendment and show that there is no merit in any of them.

(a) There is no merit in appellant's contention (based upon Brown v. Board of Education, 347 U.S. 483) that the challenged statute violates the "equal protection" provision of the Fourteenth Amendment, by failing to make education "available to all on equal terms."

At pages 30-33 of the "Statement as to Jurisdiction," appellant, seemingly, argues that *Brown v. Board of Education,* 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954) is authority for the proposition that anything that a state permits in a *private* school "must be made available to all on equal terms." Based upon this, as his major premise, appel-

lant argues that since religion is taught in some private schools it should be "available to all" *in the public schools,* and since this is not legally possible, it follows that the teaching of religion should be banned in all *private* schools, or, at least in such of them as enjoy tax exemption. In our opinion, the mere statement of appellant's contention serves to answer it. All that the *Brown* case decides is that *all* citizens have a right to "equal" facilities in respect of education *in the public schools of a state.* The principle of the *Brown* case has absolutely no relevancy in the present cause.

(b) There is no merit in appellant's contention (based upon his assertions that religious schools are in "competition" with public schools and do not serve a public purpose), that the exemption of religious schools, increases his taxes and takes his property for a non-public purpose.

What was said in reply to a similar argument by the appellant in connection with his First Amendment contention is applicable here.

(c) Appellant's contention that the challenged statute violates the California Constitution, because it exempts property "without a specific constitutional authorization", raises no federal question, but a state question only, which is foreclosed by the judgment of the Supreme Court of California.

The judgment of the Supreme Court of California holds that the challenged statute *was enacted pursuant to constitutional authority, which rendered inapplicable the constitutional provisions which appellant cites.* (46 A.C. 648, 298 P. 2d 7.) The ruling of the Supreme Court of California is the result of its construction of the *California* Constitution, and does not present a *federal* question.

3. APPELLANT'S CONTENTIONS THAT THE SUPERIOR COURT OF ALAMEDA COUNTY AND THE SUPREME COURT OF CALIFORNIA ERRED IN REJECTING THE ORIGINAL PLAINTIFF'S PROFFER OF EVIDENCE RESPECTING THE RELIGIOUS DOCTRINES TAUGHT IN THE CATHOLIC SCHOOLS OF CALIFORNIA, AND THAT THE SUPREME COURT ERRED IN REFUSING TO MAKE FINDINGS IN FAVOR OF THE ORIGINAL PLAINTIFF ON THE BASIS OF THE REJECTED EVIDENCE DO NOT PRESENT FEDERAL QUESTIONS, BUT STATE QUESTIONS ONLY, BASED UPON RULINGS IN RESPECT OF STATE PRACTICE, AND ARE FORECLOSED BY THE JUDGMENT OF THE SUPREME COURT OF CALIFORNIA.

Matters of state practice, including rulings upon the admissibility of evidence, do not present *federal* questions. On the contrary, they present *state* questions only. And in so far as such questions are involved in the present cause, they are foreclosed by the judgment of the Supreme Court of California. This applies not only to the evidence offered by the original plaintiff, and rejected by the trial Court, and the Supreme Court, but, also, to the refusal of the Supreme Court to make findings in favor of the original plaintiff on the basis of the proffered (but rejected) evidence. To the point that these matters do not present *federal* questions, see *Barrington v. Missouri*, 205 U.S. 483, 51 L.Ed. 890, 27 S.Ct. 582 (1907) and *Chapman & Dewey Land Company v. Bigelow*, 206 U.S. 41, 51 L.Ed. 953, 27 S.Ct. 679 (1907). In the latter case, speaking of a ruling which excluded proffered evidence, the Court said (260 U.S. p. 45):

> "It was . . . properly rejected *and the ruling presented no federal question.*"

See, also, *Los Angeles Farming and Milling Company v. Los Angeles*, 217 U.S. 217, 226, 54 L.Ed. 736,

30 S.Ct. 452 (1910), and *Lisenba v. California,* 314 U.S. 219, 227-8, 86 L.Ed. 166, 62 S.Ct. 280 (1941).

And see, *Neblett v. Carpenter,* 305 U.S. 297, 83 L.ed. 182, 59 S.Ct. 170 (1938), wherein the plaintiff claimed that certain actions of the Insurance Commissioner of California were erroneous because they violated statutes of the state. The State Court held to the contrary (10 Cal.2d 307, 74 P.2d 761). On certiorari, the judgment of the State Court was affirmed.

Speaking of the rulings complained of this Court said (305 U.S. 302):

> "All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment. We are, therefore, without jurisdiction to review the state court's decision of any of those questions.
>
> It is argued that the Code unconstitutionally delegates legislative functions to the Commissioner, and that the Supreme Court erred in not so holding. This, again, is a question of state law the decision of which by the State's highest court is binding upon us."

See, also:

Rupp v. Teets, 9 Cir., 235 F.2d 674 (1956), citing

Collins v. Johnston, 237 U.S. 502, 506;

United States ex rel Darcey v. Handy, 3 Cir., 224 F.2d 504, 508 (affirmed 350 U.S. 872, 100 L.ed. ....., 76 S.Ct. .....).

VI. CONCLUSION.

For the foregoing reasons, we respectfully submit that the appeal from the judgment of the Supreme Court of California should be dismissed.

Dated, San Francisco, California,
October 23, 1956.

Respectfully submitted,

ANDREW F. BURKE,

Attorney for The Roman Catholic Welfare Corporation of San Francisco, a (California) corporation, Intervenor-Appellee.

Office - Supreme Court, U.S.
FILED
NOV 14 1956
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,
Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,
Appellees.

APPELLANT'S BRIEF OPPOSING THE DEFENDANT-APPELLEES' MOTION TO DISMISS.

Appeal from the Supreme Court of the State of California.

HENRY C. CLAUSEN,
315 Montgomery Street, San Francisco 4, California,
Counsel for Appellant.

Subject Index

Page

Introduction 2

Argument 2

I. Appellant Heisey presents vital questions for review under the First and Fourteenth Amendments. Defendants have failed to show the lack of substantiality 2

A. Defendants fail to answer appellant's contention that forced tax support for and use of the tax system to promote sectarian education through exemption subsidies presents a substantial question under the First Amendment 2

1. The fallacious argument that our colonial history of religious school exemptions makes such subsidies constitutional 2

2. The fallacious argument that sectarian school exemption subsidies are universal today and that this supposed universality makes such subsidies constitutional 5

3. The erroneous contention that exemption subsidies can be equated with neutrality toward religious schools and therefore do not constitute a direct and substantial aid to sectarian education 8

B. Defendants likewise fail to answer appellant's contention that the forced exemption subsidies also present substantial questions under the equal protection and due process clauses 10

II. Defendants have failed completely to demonstrate that appellant has no standing to sue 11

Conclusion 13

Table of Authorities Cited

Cases Page

American Committee of Rabinical College v. Board of Tax Appeals, 76 N.E. 2d 719 7

Berghorn v. Reorganized School District No. 8, 260 S.W. 2d 573 (Mo., 1953) 4

Bloch v. Board of Tax Appeals, 114 Ohio St. 414, 59 N.E. 2d 145 7

Brainard v. Town of Colchester, 31 Conn. 407 8

Commonwealth v. Thomas, 119 Ky. 208, 83 S.W. 572 12

Eyers Woolen Co. v. Town of Gilsum, 24 N.H. 1, 146 Atl. 511 12

Female Academy of the Sacred Heart, 108 Comm. 136, 142 Atl. 678 7

Largent v. Texas, 318 U.S. 418 10

Pomfret School v. Town of Pomfret, 105 Conn. 456, 136 Atl. 88 7

Society of Precious Blood v. Board of Tax Appeals, 77 N.E. 2d 459 7

Stamford Jewish Center, Inc. v. Stamford, 117 Conn. 379, 168 Atl. 5 7

State ex rel. Johnson v. Boyd, 28 N.E. 2d 256 (Ind., 1940) 4

The Franklin Street Society v. Manchester, 60 N.H. 342 3

Visser v. Nooksack Valley School Dist., 33 Wash. 2d 699, 207 P. 2d 198 4

Zellers v. Huff, 55 N.M. 501, 236 P. 2d 949 (1951) 4

Zorach v. Clauson, 343 U.S. 306 8

Constitutions

United States Constitution: Page
Article XIII, Section 1 5
Article IV, Section 30 5

Texts

2 Cooley on Taxation, Section 770 (4th Ed.), 1924, pp. 1598-1601 7

Cubberly, Public Education in the United States, 44-45 2

Hunter, Tax Exemptions—A Subsidy, 8 Tax. Mag. 332, 351 8

Pfeffer, Church, State & Freedom, 106 2

Pope Pius XI in Encyclical Letter of December 31, 1929, On Christian Education of Youth, Four Great Encyclicals, Paulist press, p. 64 8

Ryan and Boland, Catholic Principles of Politics (1952), page 320 9

Simpson, The Exemption of Property from Taxation in the United States, 18 Minn. L. Rev. 411, 416-419 3